No. 18-389

In The Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes businesses engaged in commerce in each of the 50 states, including offshore enterprises in states adjacent to the continental shelf. The Chamber therefore has a keen interest in ensuring that those members' long-standing employer-employee arrangements—adopted to suit unique working conditions based on well-settled law making the Fair Labor Standards Act the sole regime governing wage-and-hour rules on the continental shelf—are not abruptly upended by the Ninth Circuit's countertextual and ahistorical interpretation of the Outer Continental Shelf Lands Act.

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[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

As explained in the petition (Pet. 14-20), the Ninth Circuit's decision created an irreconcilable conflict with the Fifth Circuit's holding (and, by extension, the Eleventh Circuit's) that state law is borrowed to govern the outer continental shelf only if there is a gap in the coverage of federal law. *See Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969). And such a coverage gap plainly does not exist for the comprehensive Fair Labor Standards Act (FLSA). That stark divide in appellate authority among the circuits covering virtually all offshore operations within the United States alone warrants review by this Court.

And the Ninth Circuit decision creates this conflict on a nationally significant legal question that requires timely resolution by this Court. Employers require settled law to make business decisions in setting up compensation schemes. For decades, the offshore industry relied upon a shared understanding—never questioned until now—in structuring standard compensation and staffing practices in accordance with the FLSA. The Ninth Circuit's decision upended those expectations because it imported into federal law a set of rules radically inconsistent with the FLSA. Complying with California-law-as-federal-law is not a matter of simply increasing a few wages or covering a few more employees with overtime pay. It would require a wholesale restructuring of compensation and hours, from the length of shifts to the number of days a worker is posted offshore.

This substitution of inconsistent state law for duly enacted, comprehensive federal law is contrary to the text and purpose of the Outer Continental Shelf Lands Act. And its disruptive consequences—threatening liability for employers who have undisputedly, and in good faith, complied with the FLSA—demand this Court's intervention now, as it has done in other cases when a divergent court of appeals' decision threatened to undo long-standing industry employment arrangements.

ARGUMENT

The Ninth Circuit's Decision Disrupts Settled Compensation Arrangements By Replacing Federal Law With Flatly Inconsistent, Outlier State-Law Rules.

A. The New Wage-and-Hour Law that the Ninth Circuit Engrafted from California Is a Major Departure from the FLSA.

The California wage-and-hour law that the Ninth Circuit imported into federal law to govern the outer continental shelf regulates differently than actual federal law—the FLSA—on virtually every subject covered by the FLSA's "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941).

Starting with a provision of particular relevance to the outer continental shelf, and likely the motivating factor behind this lawsuit, California rules for counting hours worked are inconsistent with the FLSA. Specifically, "[a]n employee who resides on his employer's premises on a permanent basis or for

extended periods of time is not considered as working all the time he is on the premises" under the FLSA, and reasonable agreement of the parties regarding compensable time will be accepted. 29 C.F.R. § 785.23. In California, however, personnel residing on an employer's premises must be paid for all hours on call, including those "engaged in personal activities, including sleeping, showering, eating, reading, watching television, and browsing the Internet." *Mendiola v. CPS Security Solutions, Inc.*, 340 P.3d 355, 361 (Cal. 2015). In so holding, the California Supreme Court acknowledged that applying the FLSA regulation would mandate a different result, but rejected the federal approach. *Id.*

But the differences go far deeper, and are much more disruptive to long-standing employment and compensation arrangements, than that. For example, overtime requirements under California law are very different from the FLSA. The FLSA imposes a workweek standard, generally requiring employers to pay time and a half for any hours worked in excess of 40 hours in a week. 29 U.S.C. § 207(a)(1). In California, however (and now on parts of the outer continental shelf), overtime must be paid, *inter alia*, at time and a half for any hours exceeding eight in a day and for the first eight hours of the seventh straight day of work, and at double time for any work beyond the first eight hours of the seventh day or in excess of 12 hours on any single day. Cal. Lab. Code § 510(a).[2]

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[2] Certain workers covered by collective bargaining agreements are exempt from these rules. Cal. Lab. Code §§ 510(a)(2), 514.

The hours-per-day and days-per-week tests under California law—which are outlier provisions shared in some form by only two to three other states and Puerto Rico, *see* U.S. Dep't of Labor, Minimum Wage Laws in the States,[3] have obvious disruptive implications for work that is often structured into tightly grouped days of 12-hour shifts, given the need to ferry employees to and from offshore platforms, *see* Pet. App. 3 (describing Respondent's 12-hour shifts and 14-day "hitches"). Making things more complicated still, California law requires employers to pay overtime to employees who are exempt under the FLSA. *E.g.*, *compare* 29 C.F.R. § 541.200(a) (2015) (exempting administrative employees whose primary duty "includes" qualifying exercise of discretion if the employee's salary exceeds $455 per week), *with* Cal. Lab. Code § 515(e), 8 Cal. Code Regs. § 11040 (requiring salary of more than $880 per week and "more than one-half of the employee's worktime" to be comprised of qualifying tasks to be exempt as an administrative employee).

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[3] *Available at* https://www.dol.gov/whd/minwage/america.htm. Alaska, Colorado, Nevada, and Puerto Rico share some variation on the hours-per-day test. *Id.* Kentucky and Connecticut have some variation on the rule requiring overtime for the seventh straight day of work, at least in certain industries. *Id.* No state other than California has both an hours-per-day and a days-per-week test, and no state requires double time for hours exceeding eight on the seventh day of work, as California does, with huge potential impact for unique offshore working conditions.

Beyond overtime, the most basic requirement of wage-and-hour law—the minimum wage itself—is different. The FLSA requires a $7.25 minimum wage, 29 U.S.C. § 206(a)(1)(C), and California law requires $11 (for larger employers), Cal. Lab. Code § 1182.12(b)(1)(B). [4] And the differences between federal and California law extend to even the smallest amounts of work. *Compare* 29 C.F.R. § 785.47 ("de minimis" rule providing that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded"), *with Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (Cal. 2018) (rehearing denied and order modified on Aug. 29, 2018) (holding that "the federal de minimis doctrine" does not apply in California, and employer must track and compensate time spent on regularly occurring post-clock-out tasks like locking a door and setting an alarm, but leaving open possibility of de minimis rule under California law for uncommon circumstances).

Finally, California not only regulates hours, wages, and overtime differently than the FLSA—it also regulates who counts as an employee in a completely different way. Under the FLSA, employee status (versus classification as an independent contractor) depends upon the "economic reality" of

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[4] Given the unique working conditions and related compensation structures for most workers on the outer continental shelf—now put at risk by the Ninth Circuit's decision—the majority of such workers have historically made far more than minimum wage. *See* Pet. App. 20 (noting Respondent was paid "well above the state and federal minimum wage").

whether the worker is dependent upon the hiring business or in business for himself, as determined by multiple factors, including the employer's "degree of control ... over the manner in which the work is performed," the worker's "opportunities for profit or loss," the worker's skill, the worker's investment in equipment, "the permanence of the working relationship," and "the degree to which the services rendered are an integral part of the putative employer's business." *Schultz v. Capital Int'l Security, Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006) (citing *United States v. Silk*, 331 U.S. 704 (1947)).

Under California law, however, a newly minted test for employee status may sweep in many more workers who, under long-settled federal law, otherwise would qualify as independent contractors. *See Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1, 34-35 (Cal. 2018) (rejecting the "federal economic reality" test). The California test starts from a mistaken presumption that all workers are employees. *Id.* at 34. It then requires any business to rebut that presumption by proving each of three required factors: the worker is free from the control and direction of the hiring entity, the worker performs work that is outside the usual course of the hiring entity's business, and the worker is customarily engaged in an independently established occupation or business of the same nature as the work performed. *Id.* at 35. Like many aspects of California wage-and-hour law, this approach is an outlier, and is applied in only one other state. *Id.* at 34 n.23 (noting that California was adopting a test applied only in Massachusetts).

California law is thus inconsistent with the FLSA (and most other states' laws) on every major topic covered by a wage-and-hour law: wages, hours, overtime, and employee status. And these are not the only inconsistencies between the FLSA and California wage-and-hour law. From the most fundamental principles to the most minute detail, the differences are legion. *See, e.g.*, *Alvarado v. Dart Container Corp. of Cal.*, 411 P.3d 528, 538 (2018) (rejecting FLSA rules on how to address bonuses when calculating overtime in favor of rule generating higher overtime pay); *compare* U.S. Dep't of Labor, Last Paycheck (employers "not required by federal law to give former employees their final paycheck immediately"),[5] *with* Cal. Lab. Code § 201(a) (requiring final wages to be paid immediately at the time of termination in most circumstances).

In sum, substituting California wage-and-hour law for federal law on the outer continental shelf, as the Ninth Circuit's decision does, is not a matter of introducing a few small contradictions into federal law, and much less is it interstitial gap-filling. Rather, imposing California's outlier wage-and-hour law in the federal outer continental shelf enclave represents the wholesale replacement of long-settled and uniform federal wage-and-hour law with a dramatically different regulatory scheme. As argued in detail by Petitioner, Pet. 32-34, such blanket displacement of a comprehensive federal scheme cannot be squared with the text and intent of the Outer Continental Shelf

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[5] *Available at* https://www.dol.gov/general/topic/wages/lastpaycheck.

Lands Act, which adopts state law as federal law only if, *inter alia*, it is "not inconsistent" with governing federal law. 43 U.S.C. § 1333(a)(2)(A).

There is no basis in federalism or federal preemption principles for a savings clause designed to preserve state authority within state jurisdiction, 29 U.S.C. § 218(a), to elevate a body of law borrowed from one state—and an outlier state, at that—over duly enacted federal law and regulations on the outer continental shelf, where there is no state sovereign authority or jurisdiction whatsoever, 43 U.S.C. § 1333(a)(1). This Court's review of the Ninth Circuit's conclusion to the contrary is critical to forestalling the immediate and hugely disruptive consequences of imposing an unforeseen—and unforeseeable—contradictory wage-and-hour regime on employers in part of the outer continental shelf.

B. The Ninth Circuit's Decision Creates Unanticipated Liabilities and Disrupts Established Compensation Arrangements for Employers Who Complied with the FLSA.

For nearly 50 years, based on the shared understanding that the comprehensive federal law provided by the FSLA alone governed compensation in the outer continental shelf, employers have relied upon this settled choice-of-federal-law rule in designing compensation arrangements in compliance with the FLSA. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Cont'l Oil*, 417 F.2d 1030. Such compensation schemes, often the product of collective bargaining, include unique (and often highly

remunerative) compensation structures well-suited to off-shore work, such as the 14-days-on, 14-days-off schedule Respondent worked, and a shift system that provided for employees' sleeping time to be excluded from compensation. *See* Pet. 9, 20-21; U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program, p. 8-4 (Jan. 2018) (estimating that oil and gas workers earn more than 150% of the average hourly wage of other employees).[6]

In a pen stroke, the Ninth Circuit's decision upended that settled understanding, put employers at risk of substantial retroactive liability for California law violations—despite uncontested compliance with the FLSA—and disrupted critical industry staffing and compensation practices. What's more, the decision throws company-wide employment arrangements (including collectively bargained agreements) into disarray as employers must now follow different rules between their offshore operations in the Gulf of Mexico and their operations offshore of states falling within the Ninth Circuit. *See* Pet. 20. Worse still, the rules employers must follow within the Ninth Circuit are splintered further by each state's laws—the vast majority of which are very different from California's, as described above.

This Court has recognized the importance of protecting well-settled industry compensation practices from abrupt and unwarranted shifts in wage-and-hour rules. And the Court has not hesitated

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[6] *Available at* https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

to intervene when a court of appeals—not infrequently the Ninth Circuit—issued a decision in conflict with other courts of appeals that cast doubt on long-standing employer-employee arrangements. It should do the same here.

For example, in *Encino Motorcars LLC v. Navarro*, 138 S. Ct. 1134 (2018) (*Encino II*), the Court granted certiorari to review—and ultimately reverse—the Ninth Circuit's interpretation of the FLSA excluding automobile service advisors from the overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles ...." 29 U.S.C. § 213(b)(10)(A). The Court's rejection of the Ninth Circuit's interpretation followed its earlier repudiation of the Ninth Circuit's deference to a procedurally invalid regulation that "undermined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation." *Encino II*, 138 S. Ct. at 1139 (describing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (*Encino I*)). As *Encino I* explained, before the Ninth Circuit's decision (and the invalid regulation on which it was initially based), "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt, and the position ultimately taken by the Ninth Circuit (and rejected by the Court) "could necessitate systemic, significant changes to the dealerships' compensation arrangements." 136 S. Ct. at 2126. Such drastic changes with far-reaching economic

consequences cannot be imposed without a clear Congressional mandate.

Likewise, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court emphasized the importance of settled compensation practices in rejecting a court of appeals' minority view requiring overtime pay for certain pharmaceutical sales representatives under the FLSA. There, too, the Court emphasized that the industry had a "decades-long practice of classifying pharmaceutical detailers as exempt employees," supported by decades of acquiescence by the Department of Labor and the clear language of the statute and regulations. *Id.* at 157; *see also Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 518 (2014) (reversing Ninth Circuit's interpretation of FLSA in favor of an interpretation that was "fully consistent with an Opinion Letter the Department [of Labor] issued in 1951"). Furthermore, the Court reasoned, concurring in the court of appeals' interpretation would constitute an "unfair surprise," and make it "challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position." *Christopher*, 567 U.S. at 158, 166.

So, too, here—in spades. The turmoil caused by the Ninth Circuit's unilateral imposition of California law to displace federal law, on federal land, surpasses the disruption in the cases where the Court has seen fit to intervene before. Unlike *Encino Motorcars* and *Christopher*, far more than a shift in overtime obligations for a single profession is at stake here. Instead, the Ninth Circuit's decision instantly altered

virtually every single compensation rule governing every kind of worker on the continental shelf, given the major differences between California law and the FLSA (and the rules applicable under most other states' laws).

Adding insult to injury, unlike those other cases—which involved at least arguably unclear provisions of the FLSA and related regulatory shifts—there is no dispute here that offshore employers fully complied with the FLSA's commands. Subjecting them to potentially massive liability based on the imposition of a body of law that they could not have possibly foreseen would apply—and one that radically differs from the rules that all parties understood to govern, to boot—would be an unfair surprise, indeed.[7] And it would, of necessity, require substantial changes to decades-old compensation and staffing practices that are eminently suited to offshore work. There is no basis in the text, structure, or history of the Outer Continental Shelf Lands Act for this topsy-turvy outcome. This Court's review is urgently needed to protect employers' settled expectations and long-standing industry practices.

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[7] The need for review is not lessened because the Ninth Circuit—in response to the petition for rehearing en banc—left the possibility open that employers *might* escape retroactive liability. Pet. App. 43. That was so in *Encino I* as well, but—as the Court noted—did not lessen the stakes for employers who faced the risk of "substantial ... liability." 136 S. Ct. at 2126.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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